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In the Supreme Court of the United States

OCTOBER TERM, 1990

MARYLAND HIGHER EDUCATION LOAN CORPORATION, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY OF EDUCATION, ET AL.

SOUTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY OF EDUCATION, ET AL.

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 3001 of the Omnibus Budget Reconciliation Act of 1987 (OBRA), 20 U.S.C. 1072(e) (repealed), amended provisions of the Guaranteed Student Loan Program (GSLP) created by the Higher Education Act of 1965. Section 3001 required agencies that guaranty GSLP loans to transfer "excess" GSLP cash from their reserve funds to the Secretary of Education, for deposit into the general GSLP fund maintained by the Secretary for reimbursement purposes. Section 3001 also made the guaranty agencies' right to receive federal reimbursement for losses subject to their compliance with the transfer requirement. Section 3001 has been challenged on the ground that it violates the Takings Clause of the Fifth Amendment. The questions presented are:

1. Whether the guaranty agencies had "private property" rights to the excess cash within the meaning of the Takings Clause.

2. Whether Section 3001 "took" the guaranty agencies' "vested right" to reimbursement under pre-OBRA contracts between the agencies and the Secretary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) [1] in these consolidated cases is reported at 897 F.2d 1272. The district court opinion in the Maryland case (89-1873 Pet. App. 17a-19a) is unreported. The opinion of the district court in the South Carolina case (89-2027 Pet. App. 19a-39a) is reported at 716 F. Supp. 886. The opinion of the district court in the North Carolina case (90-4 Pet. App. 15a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1990. Petitions for rehearing were denied on March 28, 1990. Pet. App. 12a-14a. The petition for a writ of certiorari in No. 89-1873 was filed on June 1, 1990. The petition in No. 89-2027 was filed on June 22, 1990. The petition in No. 90-4 was filed on June 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Higher Education Act of 1965 (the Act), 20 U.S.C. 1071, established the Guaranteed Student Loan Program (GSLP). In that program, public and private lending institutions make low-interest, higher-education loans, subsidized by the federal government, to students. State and nonprofit private agencies that participate in the GSLP must execute an "insurance program agreement" with the Secretary in which the agencies promise to oper-

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[1] Unless otherwise noted, we will use "Pet. App." to refer to the appendix to the petition in No. 89-1873. We will refer to the petitioner in No. 89-1873 as the "Maryland petitioner," to the petitioner in No. 89-2027 as the "South Carolina petitioner," and to the petitioners in No. 90-4 as the "North Carolina petitioner."

ate a student loan insurance program that meets GSLP requirements and to guarantee lenders they will pay 100% of the unpaid principal on a qualifying student loan in case of default or other failure to repay. 20 U.S.C. 1078(b); 34 C.F.R. 682.410, 682.411. The agreements specify that the state agency agrees "to be bound by all changes in the Act or regulations in accordance with their effective dates," Pet. App. 8a, and the regulations similarly provide that "[a]ll of the agreements are subject to subsequent changes in the Act or the regulations that apply to the GSLP * * *." 34 C.F.R. 682.400(d). In return, the Secretary agrees to make interest subsidy payments, on behalf of students, to lenders whose loans are guaranteed by the agency. *Id.* at 269a. The Act authorizes the Secretary to pay "special allowances" to the lenders, so that their return is not "less than equitable." 20 U.S.C. 1087-1(a). See Pet. App. 5a.

The Higher Education Act of 1965 also authorizes the Secretary to enter into a "guaranty agreement" with a participating state guaranty agency in which the Secretary agrees to reimburse the state guaranty agency for losses resulting from the default of a student borrower on the unpaid balance of the principal and accrued interest of any GSLP loan. 20 U.S.C. 1078(c)(1)(A).[2] The amount of re-

[2] Before 1976, guaranty agencies were required to insure only 80% of the principal amount of covered loans, and the Commissioner of Education was authorized to enter into "reinsurance agreement[s]" with them in which the Commissioner would undertake to reimburse 80% of the agencies' guaranty losses. See 34 C.F.R. 682.404(a)(1). Under the Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2114, 2120, the Commissioner was authorized to enter into "supplemental reinsurance agreements" with agencies that insured 100% of their covered loans, in which the Commissioner would undertake to reimburse 100% of their guaranty losses if they had an overall default rate below 5% of the principal amount of all loans; 90% if the default rate was between 5% and 9%; and 80% if the default rate exceeded

imbursement ranges between 80% and 100% of the amount expended by the agency in discharge of its guaranty obligations, depending on the agency's overall default rate. Since 1986 guaranty agencies have been required to pay a reinsurance fee to the Secretary, equal either to 0.25% of the total principal amount of covered loans guaranteed by the agency that year, or 0.5% if the agency's overall default rate exceeded 5%. 20 U.S.C. 1078(c)(9). See Pet. App. 5a.

As amended in 1986, the Higher Education Act of 1965 states that a participating state guaranty agency is "deemed to have a contractual right against the United States" during the life of each GSLP loan "to receive reimbursement" according to the provisions of that Act. Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1381 (codified at 20 U.S.C. 1078(c)(1)(A)). The guaranty agreement, however, like the insurance program agreement, obliges each state guaranty agency to comply with "all changes in the Act or Regulations in accordance with their effective dates." C.A. App. 24a, 28a, 141a-142a, 148a-149a, 270a, 275a; see Pet. App. 8a. The guaranty agreement also provides that the Secretary may withhold or demand compensation for federal payments—including reimbursements—if the state guaranty agency fails to comply with the Act or its implementing regulations. *Id.* at 26a, 31a-32a, 145a-146a, 152a, 270a-271a, 278a.

9%. See 34 C.F.R. 682.405. Under the Higher Education Amendments of 1986, Pub. L. No. 99-498, § 402(a) 100 Stat. 1371, all guaranty agencies must insure 100% of their covered loans, and the reimbursement rate is the same as the Commissioner undertook in the supplemental reinsurance agreements. Since 1986 the "reinsurance" and "supplemental reinsurance" agreements have been referred to collectively as "guaranty agreements."

The Higher Education Act of 1965 authorizes or provides for other sources of revenue to state guaranty agencies. It authorizes the Secretary to make cash advances to help establish or strengthen such agencies, 20 U.S.C. 1072(a)(1); it permits such agencies to collect a single insurance premium from lenders of not more than 3% of the principal amount of a loan, 20 U.S.C. 1078(b)(1)(H); it permits such agencies to retain 30% of amounts they collect from defaulting borrowers after reinsurance payments have been made to them, 20 U.S.C. 1078(c)(2)(D) and (c)(6)(A)(ii);[3] and it directs the Secretary to pay (and provides that guaranty agencies shall "be deemed to have a contractual right against the United States to receive") a portion of the agencies' administrative costs, 20 U.S.C. 1078(f)(1)(A) and (B). Pet. App. 5a.

Under the Secretary's regulations, state guaranty agencies must deposit reimbursements, revenue authorized or provided by the Act, and all state appropriations, gifts, grants, and investment earnings, into a "reserve fund." 34 C.F.R. 682.410(a)(1). The regulations stipulate that none of the money in the reserve fund may be used for purposes other than GSLP purposes specified by the Secretary: namely, guaranteeing loans, paying claims, refunding overpayments and advances, and administering the program. 34 C.F.R. 682.410(a)(2)-(6).

b. A major problem with the GSLP has been the increasing accumulation and use of cash in the guaranty agencies' reserve funds. In a 1986 report commissioned by Congress, the Comptroller General found that state guar-

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[3] Under 20 U.S.C. 1078(c)(8), a state guaranty agency must assign to the Secretary any loan for which the Secretary has made a reimbursement payment if the Secretary determines that is required to protect the federal fiscal interest. When such an assignment is made, the agency may not retain any portion of the collections. 34 C.F.R. 682.409(b).

anty agencies had accumulated huge cash reserves that "exceed the risks guarant[y] agencies are asked to assume [at the] expense of the federal government and student borrowers." C.A. App. 380a. The Comptroller General also found that at least some agencies were using the reserves for improper purposes. *Id.* 381a-383a. The Comptroller General recommended, among other things, that Congress set limits on the amount of cash guaranty agencies could retain in their reserve funds, to correspond to the actual financial risks they face. *Id.* at 408a-409a. The Comptroller General later submitted a report to Congress with draft guidelines for establishing maximum cash reserve levels. *Id.* at 434a-471a.

c. On December 22, 1987, Congress enacted the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-36 (the 1987 OBRA Amendments). Section 3001 of OBRA amended several GSLP provisions of the Higher Education Act of 1965. 20 U.S.C. 1072(e) (repealed).[4] Under Section 3002 of the 1987 OBRA Amendments, 101 Stat. 1330-38, the provisions of Section 3001 were scheduled to, and did, expire on September 30, 1989.

The 1987 OBRA Amendments required the Secretary to determine the "maximum cash reserve[ ]" permitted each guaranty agency for fiscal year 1986 under a statutory formula based on the Comptroller General's draft guidelines. 20 U.S.C. 1072(e)(1) (repealed).[5] If the Secretary deter-

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[4] In the legislative history of the OBRA, Section 3001 appears for the first time in the conference committee report. H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 39-41 (1987).

[5] The maximum level was the greater of "(A) 40 percent of the total amount paid by that agency on insurance claims during the preceding fiscal year; (B) 0.3 percent of the original principal amount of loans that are insured by that agency and that are outstanding at the end of such preceding fiscal year; (C) an amount which, when combined with

mined that any guaranty agency had, at the end of fiscal year 1986, cash reserves in excess of its "maximum," the Secretary was required to direct the agency to "eliminate" the excess by one or more of the following methods: (a) repaying advances of federal funds made by the Secretary to the agency and not otherwise required to be repaid; (b) withholding and canceling reimbursement claims otherwise payable by the Secretary to the agency; (c) reducing the amount of administrative cost allowances for which the agency otherwise would apply to the Secretary; and (d) any other method of reducing payments from, or increasing payments to, the federal government. 20 U.S.C. 1072(e)(2) (repealed). The 1987 OBRA Amendments also included provisions to enforce the transfer requirement. Those provisions made the state guaranty agencies' statutory "contractual right" to receive reimbursements and administrative cost allowances from the Secretary "subject to" the agencies' compliance with the transfer requirement. 20 U.S.C. 1078(c)(1)(A) and (f)(1)(B) (repealed).[6]

The 1987 Amendments allowed the Secretary to waive the requirement to eliminate excess cash reserves if he determined that an agency's financial position had deteriorated significantly since the end of the preceding fiscal year, that significant changes in economic circumstances or the agency's loan insurance program rendered the maximum reserve level inadequate for the continued function-

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all other parts of total agency reserves, equals 0.4 percent of such original principal amount; (D) $500,000; or (E) the amount required to comply with the reserve requirements of a State law as in effect on October 17, 1986." 20 U.S.C. 1072(e)(1) (repealed).

[6] Similarly, the 1987 Amendments made the amount of the reinsurance fee paid by agencies to the Secretary "subject to" the transfer requirement. 20 U.S.C. 1078(c)(9)(A) (repealed). That allowed agencies to increase the fee in satisfaction of that requirement. See 20 U.S.C. 1072(e)(2)(D) (repealed).

ing of the agency, or that in eliminating the excess cash reserves the agency would violate contractual obligations on the date the 1987 OBRA Amendments were enacted requiring the agency to maintain a specific level of reserve funds. 20 U.S.C. 1072(e)(3) (repealed). The Amendments also set a nationwide limit of $250 million on the amount of excess cash reserves to be eliminated. 20 U.S.C. 1072(e)(4) (repealed).

All excess cash transferred to the Secretary by guaranty agencies under the 1987 Amendments was deposited in the GSLP student loan insurance fund maintained by the Secretary under 20 U.S.C. 1081. C.A. App. 377a. That fund is used to make reimbursement payments to guaranty agencies, as well as to make payments for defaulted loans insured directly by the Secretary. *Ibid.*

2. As required by the 1987 OBRA Amendments, the Secretary calculated the statutory "maximum cash reserve" for the Maryland, South Carolina, and North Carolina petitioners. The Secretary concluded that each one had excess cash reserves, and directed each petitioner to transfer that excess to the federal government.[7] After each peti-

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[7] After calculating the Maryland petitioner's maximum cash reserve, the Secretary informed it that it was required to transfer $10,797,400 in excess cash reserves. Pet. App. 7a. The Maryland petitioner had certified cash reserves of $22,554,507, and its "maximum cash reserve" was $10,384,151. C.A. App. 182a. The amount of excess cash reserves petitioners were directed to transfer was calculated by subtracting the "maximum" from the amount certified, further subtracting an amount owed to the Secretary under a different statute, and ratably reducing the result to comply with the $250 million nationwide ceiling on the recovery of excess cash reserves. The Maryland petitioner applied for, but was denied, a waiver of the transfer requirement. Pet. App. 7a. That denial was not challenged in the courts below.

The Secretary determined the South Carolina petitioner's maximum cash reserve, and he informed it that it was required to transfer

tioner refused to comply with the Secretary's directive, the Secretary withheld GSLP reimbursements otherwise payable to each petitioner until the full amount was recovered. Pet. App. 7a.

Petitioners filed separate suits in different district courts challenging the Secretary's actions. The courts in Maryland and South Carolina held that the 1987 OBRA Amendments were unconstitutional and enjoined their enforcement.[8]

$2,739,528 of its excess cash reserves. Pet. App. 6a. The South Carolina petitioner had certified cash reserves of $3,633,720, and a "maximum cash reserve" of $500,000. C.A. App. 94k. The South Carolina petitioner applied for, but was denied, a waiver of the transfer requirement. The South Carolina petitioner challenged the denial of the waiver in the district court, but the district court did not decide that question. 89-2027 Pet. App. 38a-39a n.9.

The Secretary determined the North Carolina petitioner's maximum cash reserve, and he informed it that it was required to transfer $15,911,946 of its excess cash reserves. Pet. App. 7a. The North Carolina petitioner had certified cash reserves of $18,646,346, and a "maximum cash reserve" of $1,421,534. C.A. App. 308a-310a. The North Carolina petitioner applied for a waiver, and the Secretary waived $13,279,161 of the amount due, based on 20 U.S.C. 1072(e)(3)(A)(iii) (repealed). C.A. App. 313a-316a. The North Carolina petitioner did not challenge the Secretary's waiver decision.

[8] In the South Carolina case, the district court held that under the guaranty agreement and the statute deeming state guaranty agencies to have a "contract[ ] right" to receive reimbursements, the South Carolina petitioner acquired "vested property rights" to reimbursements, and that the 1987 Amendments violated the Fifth Amendment by "tak[ing] away that property." 89-2027 Pet. App. 37a. The Secretary had argued that the agreement requiring the South Carolina petitioner to comply with "all changes in the Act or Regulations" defeated any claim of "vested" rights. The court rejected that argument on the ground that the reservation was ineffective since it did not appear in the Higher Education Act of 1965 itself. 89-2027 Pet. App. 34a-37a. The court enjoined the Secretary from enforcing the 1987 OBRA Amendments against the South Carolina petitioner, and ordered him

By contrast, the North Carolina court upheld the Amendments.[9]

The Secretary appealed from the Maryland and South Carolina judgments, and his appeals were consolidated with an appeal in the North Carolina case.[10] The court of appeals reversed the judgments in the Maryland and South Carolina cases and upheld the judgment in the North Carolina case.

The court of appeals rejected the argument that the 1987 OBRA Amendments could not modify the guaranty agree-

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to release to it the reimbursements he had withheld. *Ibid.*

The Maryland district court adopted the decision of the South Carolina district court, holding that the amendments were an uncompensated taking of the Maryland petitioner's right to reimbursement. Pet. App. 19a. The court stated that "[i]n a nutshell, the excess cash reserves are the property of the plaintiff, and despite language making the plaintiff's contract with the defendants conformable to legislative changes, the federal government cannot simply take the cash reserves away from the plaintiff." *Ibid.*

[9] The North Carolina district court held that the North Carolina petitioner "has none of the essential 'private property' rights over the money in its [reserve fund], including the excess cash reserves." 90-4 Pet. App. 20a. The court reasoned that "once [the North Carolina petitioner] executed its GSLP agreements with the Department of Education and agreed to abide by the Higher Education Act and its regulations, it necessarily relinquished any 'ownership' claim to funds it thereafter would be permitted to receive and retain for GSLP purposes." *Ibid.* The court also observed that the North Carolina petitioner was prohibited by the Secretary's regulations "from using *any* of the money in its reserve fund for purposes other than the GSLP purposes specified by the Secretary." *Id.* at 21a. Since "the federal government has control over most of the sources and all of the uses of [the North Carolina petitioner's reserve fund]," the district court held, "the excess cash reserves which are the subject of this action are not 'private property,' but public property, and as such are not entitled to Fifth Amendment protection." *Id.* at 22a.

[10] The court of appeals stayed the final judgments in the Maryland and South Carolina cases pending disposition of the consolidated appeals.

ments because the Higher Education Act of 1965 did not expressly reserve to the federal government the right to modify agreements executed under that Act. Relying on *Bowen* v. *Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41, 52-53 (1986), the court held that the power to modify contractual arrangements is reserved unless it is expressly relinquished. Pet. App. 8a. For that reason, the court held, Congress had the authority to modify the federal government's obligations under the GSLP guaranty agreements. *Id.* at 8a-9a.

The court of appeals then held that the 1987 OBRA Amendment requirement that state guaranty agencies transfer excess reserves to the Secretary did not "take" the agencies' "private property" in violation of the Fifth Amendment Takings Clause, because the agencies did not have "private property" rights to the excess reserves. Pet. App. 9a-10a. The court reasoned that "[i]f property comes within the control of the United States to such an extent that its use is ultimately under the direction of the United States, then it loses its character as 'private' property, and becomes public to such an extent that it is not subject to a takings prohibition under the Fifth Amendment." *Id.* at 9a. Since the Secretary's regulations "completely control the reserve funds' uses," the court of appeals reasoned, those regulations were "the sort of 'existing rules or understandings' which prevent any of the guaranty agencies from acquiring an ownership interest in its reserve fund which would entitle it to protection as private property under the Takings Clause." *Id.* at 10a.

The court of appeals also rejected the argument that the "private property" at issue was the guaranty agencies' "vested contractual rights to receive reimbursement payments," and that the enforcement provision of the 1987 OBRA Amendments, which empowered the Secretary to withhold reimbursements from noncomplying agencies,

takes that "property." Pet. App. 10a. The court noted that a clause in the guaranty agreements required every guaranty to comply with "all changes in the Act or regulations in accordance with their effective dates" as a condition of receiving reimbursement. *Id.* at 11a. That clause, the court explained, expressly put the agencies on notice that the Higher Education Act of 1965 could be amended in the future. *Id.* at 10a. Because Congress had not expressly relinquished its amendment power, the court stated, the contractual reservation was effective. *Id.* at 8a-9a. The court of appeals concluded that "the public nature of the reserve funds themselves," which include "reimbursement payments destined for inclusion in such reserve funds," when "coupled with the express contractual reservation of the power to amend the terms of the GSL program and the fact that the legislative changes involve a comprehensive federal/state social welfare program, forecloses a finding that the state agencies have obtained unalterable vested property rights to certain payments." *Id.* at 11a.

ARGUMENT

Petitioners have sought review of the court of appeals' judgment upholding the constitutionality of Section 3001 of the 1987 OBRA Amendments to the Higher Education Act of 1965 against a challenge based on the Takings Clause of the Fifth Amendment. The decision below, however, does not warrant review by this Court, for several reasons.

1. There is no conflict among the circuits on the questions presented. The Fourth Circuit's decision in this case is fully consistent with the Sixth Circuit's decision in *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d 894 (1990), petition for cert. pending, No. 90-13, and the Eighth Circuit's decision in *Education Assistance Corp.* v. *Cavazos*, 902 F.2d 617 (1990), petition for cert. pending, No. 90-84,

both of which also upheld the 1987 OBRA Amendments against identical constitutional challenges.[11]

2. The questions presented by this case are of no continuing importance. The amendments to the Higher Education Act of 1965 that gave rise to this litigation were enacted as Section 3001 of the 1987 OBRA Amendments. An accompanying provision of the 1987 OBRA Amendments, Section 3002, however, stated that the provisions of Section 3001 would expire on September 30, 1989. Section 3001 was not extended and therefore expired on that date. Moreover, no similar legislation has been introduced in Congress. Accordingly, the questions presented by this case are of only historical interest, and review by this Court is not warranted.

3. The decision below is also correct. The Fourth Circuit correctly held that Section 3001 of the 1987 OBRA Amendments did not violate the Takings Clause because petitioners did not have "private property rights" in regard to the excess in their reserve funds, and because withholding reimbursement did not unconstitutionally abrogate petitioners' "contract" rights. Accord *Education Assistance Corp.* v. *Cavazos*, 902 F.2d at 626-630; *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d at 898-902.

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[11] District courts in the First, Second, Third, Seventh, and Eleventh Circuits have also upheld the 1987 Amendments against identical challenges. *Maine State Bd. of Educ.* v. *Cavazos*, Civil No. 88-0273 (D. Me. July 25, 1990); *Conn. Student Loan Foundation* v. *Cavazos*, No. H89-182 (D. Conn. Jan. 10, 1990), appeal withdrawn by stipulation, No. 90-6111 (2d Cir. June 18, 1990); *Delaware* v. *Cavazos*, 723 F. Supp. 234 (D. Del. 1989), appeal pending, No. 90-3339 (3d Cir. docketed May 30, 1990); *Great Lakes Higher Educ. Corp.* v. *Cavazos*, 711 F. Supp. 485 (W.D. Wis. 1989), appeal pending, No. 89-2748 (7th Cir. argued May 15, 1990); *Georgia Student Finance Comm'n* v. *Cavazos*, No. 1:89-cv-160-MHS (N.D. Ga. July 9, 1990). Ten other suits challenging the constitutionality of the 1987 OBRA Amendments are pending in various district courts. 89-1873 Pet. 13-14 n.5.

a. "Private property" is property as to which the claimant has the rights of "free use, enjoyment, and disposal." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917). Such rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source," such as pertinent statutes and regulations. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984). Although the Takings Clause protects "private property" owned by a state, *United States* v. *50 Acres of Land*, 469 U.S. 24 (1984), under the GSLP laws and regulations, the amounts in petitioners' reserve funds are not properly characterized as their "private property," for several reasons.

First, the federal government is the direct source of or the indispensable catalyst for virtually all the cash in petitioners' reserve funds. For example, during the period of time the Maryland petitioner's excess cash reserves were determined, its reserve fund deposits consisted of reimbursements, administrative cost allowances, insurance premiums from lenders, and a portion of the collections from defaulting borrowers on loans for which the Secretary had already made reimbursement payments.[12] Those reimbursements and administrative cost allowances came directly from the federal government. The insurance

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[12] The record shows that from October 1, 1986, through September 30, 1988, the Maryland petitioner received a total of $75,560,690, of which $47,901,314 came from federal reimbursements; $2,888,694 came from federal administrative cost allowances; $16,206,870 came from the portion of collections on defaulted loans that the Secretary allowed the Maryland petitioner to retain; and $4,370,791 came from insurance premiums paid by lenders. C.A. App. 191a, 207a. The remaining $4,193,021 came from the investment of the reserve fund cash in Treasury or other federally-approved securities. *Ibid.* Thus, the Maryland petitioner's statement that its cash reserves "were derived entirely from non-federal sources," 89-1873 Pet. 10, is palpably incorrect.

premiums came from lenders induced to participate in the GSLP by federally-backed loan guarantees, federal interest subsidies, and federal special allowances. The collections were give-backs from the federal government of amounts to which the Secretary was entitled by virtue of his reimbursement payments, and which he could have kept for himself by demanding assignment of the underlying loans. Pp. 3-5 & n.5, *supra*. Second, all of the cash in petitioners' reserve funds must be used for GSLP purposes specified by the Secretary; none of it lawfully can be used for any other purpose. 34 C.F.R. 682.410(a)(2).[13] Thus, the court of appeals properly concluded that petitioners could not freely use, enjoy, and dispose of the cash in their reserve funds. For those reasons, the court properly held that the Fifth Amendment does not prohibit the compulsory transfer of some of this cash from petitioners' individual reserve funds to the general GSLP fund.[14]

The court of appeals' holding also raises no significant issue of federalism. Petitioners are creatures of state law

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[13] The Maryland petitioner asserts that the regulation prohibiting the use of reserve fund cash for non-GSLP purposes "did not even come into existence until 1986." 89-1873 Pet. 10 n.1. That is not true. Before 1986, the same use restriction applied, but in literal terms it applied only to agencies which were holding federal advances paid under 20 U.S.C. 1072. The Maryland petitioner was such an agency. C.A. App. 94h. In 1986, the Secretary clarified the regulation in order to make it applicable to all guaranty agencies regardless of whether they were holding federal advances. 51 Fed. Reg. 40,886, 40,909 (1986).

[14] The decision below does not conflict with *CIR* v. *Lincoln Savings & Loan Ass'n*, 403 U.S. 345 (1971), as the Maryland petitioner claims. 89-1873 Pet. 10. The question in that case was whether an additional premium paid by a state-chartered savings and loan association to the Federal Savings and Loan Insurance Corporation was deductible as an ordinary and necessary business expense under the Internal Revenue Code. 403 U.S. at 345-346. That case did not involve a takings question.

and were required by state law to establish reserve funds. But once they voluntarily executed insurance program and guaranty agreements binding themselves to comply with GSLP statutory and regulatory requirements, petitioners relinquished any claim of ownership to federally donated or generated cash that they would receive and deposit in those funds. Even the state laws cited by the South Carolina and North Carolina petitioners recognize that the cash in the reserve funds is held by petitioners as trustees, to be used exclusively for GSLP purposes. S.C. Code Ann. § 59-115-110 (Law. Co-op 1972) (*reprinted at* 89-2027 Pet. App. 54a); N.C. Gen. Stat. § 116-204(6) (1987); *Durham* v. *McLeod*, 259 S.C. 409, 413, 192 S.E.2d 202, 204 (1972); *State Educ. Assistance Auth.* v. *Bank of Statesville*, 276 N.C. 576, 591, 174 S.E.2d 551, 562 (1970).

This Court's decision in *Dayton-Goose Creek Ry.* v. *ICC*, 263 U.S. 456 (1924), is instructive in this regard. That case involved a challenge under the Takings Clause to the Transportation Act of 1920, ch. 91, § 15a, 41 Stat. 489-491. The Transportation Act fixed a maximum 6% rate of return for carriers engaged in interstate commerce, required carriers to transfer any excess return equally to a reserve fund to be maintained by each carrier and to a general railroad revolving fund to be maintained by the Interstate Commerce Commission. Revenues placed in those reserve funds could generally be used only for specific purposes, such as paying interest on bonds or other securities, paying rent on leased railroad lines, paying dividends, and making loans to other carriers to meet expenses. *Dayton-Goose Creek Ry.*, 263 U.S. at 476-477. This Court rejected the railroads' claim that the statute took their property without just compensation. The Court reasoned that the Act made a carrier "only a trustee for the excess over a fair return received by it," *id.* at 484, and that, since the railroads were guaranteed a fair return, it was not unreason-

able to require them to contribute to a fund designed to help the "weaker" carriers, *id.* at 484-485. In this case, state guaranty agencies also have a role akin to that of a trustee, since they administer funds that flow in and out of the GSLP. *Education Assistance Corp.* v. *Cavazos*, 902 F.2d at 627; *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d at 899. As the Sixth Circuit put it, "the Secretary is transferring the funds from a federal program with a state administrator, not a state program." *Ibid.* Under these circumstances, Section 3001 of the 1987 OBRA Amendments does not take petitioners' property interest in excess reserves.

b. There is also no merit to petitioners' argument that the Secretary unconstitutionally took their property by not reimbursing petitioners in accordance with the reimbursement agreements that petitioners had executed with the Secretary before the 1987 OBRA Amendments became law.[15] Petitioners' claim rests on the assumption that they had a contractual (and therefore a property) interest in a rate of reimbursement that could not be affected by subsequent legislation. That assumption, however, is mistaken.

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[15] Once the court of appeals decided (correctly) that the petitioners did not have a "private property" right in excess cash reserves, the court did not have to reach the other question petitioners present: namely, whether the enforcement provision of the 1987 OBRA amendments, which made the receipt of reimbursements subject to compliance with the transfer requirement, unconstitutionally took petitioners' contractual rights to those reimbursements. Instead, the court could have upheld the Secretary's withholding of petitioners' reimbursements on the basis of petitioners' guaranty agreements, which expressly authorize the Secretary to withhold reimbursements due to an agency's failure to comply with federal law. C.A. App. 26a, 31a-32a, 145a-146a, 152a, 270a-271a, 2678a. In any event, the court of appeals correctly held that petitioners have no "vested" or "property" rights under their guaranty agreements in reimbursement.

Petitioners rely on the terms of the reimbursement agreements they had previously executed with the Secretary. 89-1873 Pet. 5; 89-2027 Pet. 13-14; 90-4 Pet. 4-5, 16-23. The very text of those agreements, however, makes clear that petitioners' right to reimbursement is contingent; it is expressly conditioned on petitioners' compliance with whatever provisions of the Higher Education Act of 1965 and its implementing regulations are currently in force, whether those provisions existed when the underlying loans were made or, as in the case of the 1987 OBRA Amendments, were added by subsequent amendment. Because the contingency was spelled out in the agreements, it was effective against petitioners even though the Higher Education Act of 1965 does not contain express terms reserving Congress's power to amend its provisions. *Miller* v. *The State*, 82 U.S. (15 Wall.) 478, 495, 497 (1872). See *Stockholders* v. *Sterling*, 300 U.S. 175, 183 (1937); *Looker* v. *Maynard*, 179 U.S. 46, 52 (1900). See generally *POSSE*, 477 U.S. at 51-54. As this Court explained in *POSSE*, 477 U.S. at 52 (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147, 148 (1982)), "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign," because "sovereign power, even when unexercised is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." Accordingly, the reimbursement agreements did not guarantee petitioners immunity from subsequent changes in the GSLP, as they claim. Quite the contrary, the agreements were expressly subject to such changes.

Petitioners' claim to a contractual right to reimbursement also rests on the Higher Education Amendments of 1986, Pub. L. No. 99-498, § 402(a), 100 Stat. 1376 (codified at 20 U.S.C. 1078(c)(1)(A)). That section pro-

vides that state guaranty agencies "shall be deemed to have a contractual right against the United States" during the life of each GSLP loan "to receive reimbursement" according to the provisions of the Higher Education Act of 1965. That argument also lacks merit because no one acquires a property right in legislation. Congress therefore can modify the terms of social welfare programs without providing compensation to parties that lose the benefits they enjoyed under prior law. See *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177-178 (1980); *Flemming* v. *Nestor*, 363 U.S. 603 (1960). Indeed, in social welfare programs such as the GSLP, it is essential for Congress to have such flexibility in order to be able to accommodate the changing needs of a particular program within budgetary constraints.

Relying on *Lynch* v. *United States*, 292 U.S. 571 (1934), petitioners argue that contracts are a form of property and that Congress cannot breach its reimbursement contracts with them.[16] *Lynch*, however, is inapposite. In that case, this Court held that Congress had not withdrawn jurisdiction from the district courts to consider challenges to a federal law that repealed provisions of the War Risk Insurance Act, which, in turn, authorized payment of death benefits under insurance policies taken out by soldiers before that statute was enacted. This Court observed in dicta that in consideration for the government's obligation to pay benefits, "the insured paid prescribed monthly premiums" and the insurance policies created "vested rights" that could not be nullified by a later statute. 292 U.S. at 576, 577. The Court suggested that result would obtain even though the policies were made subject to

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[16] Petitioners also rely on *Perry* v. *United States*, 294 U.S. 330, 350-351 (1935), but the gold contracts in that case were not similar to the cooperative federal-state program at issue here, and they also did not contain a clause in which the private party agreed to be bound by future changes in the governing legislation.

future legislation, unless Congress had expressly reserved the power to curtail benefits in the future, or was acting under the police power or some other paramount power. *Id.* at 578, 579.

This case is not governed by the principle stated in *Lynch*, for several reasons. To begin with, the life insurance policies in *Lynch* are not comparable to the reimbursement agreements at issue here, which were executed by the state guaranty agencies in connection with a social welfare program designed for the benefit of third parties. Also, petitioners' alleged "contract right" to reimbursement did not vest when petitioners executed their guaranty agreements; any such right was contingent. In addition, the enforcement provision has not annulled that contingent right; it simply follows the terms of the guaranty agreements in withholding reimbursements from petitioners if they do not satisfy their contractual obligation to comply with valid provisions of the Higher Education Act of 1965, such as the transfer requirement. Finally, the 1987 OBRA Amendments did not relieve the federal government of its obligation to reimburse the state guaranty agencies; the purpose of the amendments was to recapture funds held by the agencies in a fiduciary capacity that Congress found were unnecessary to their continued functioning. See *Education Assistance Corp.* v. *Cavazos*, 902 F.2d at 630; *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d at 900-901. Thus, as the court of appeals held, Section 3001 of the 1987 OBRA Amendments did not take from petitioners a vested contract right to reimbursement.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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